Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

ZACHARY WITMAN, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

On Petition for a Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. When the Pennsylvania Superior Court reversed the suppression court's proper exclusion of evidence seized without a warrant under a crime scene exception, did it ignore this court's decision in *Flippo*, *infra*, expressly rejecting such an exception to the warrant requirements of the Fourth Amendment?

II. Did the Pennsylvania Superior Court err in finding an exception to the Fourth Amendment's proscription against warrantless searches and seizures, by sanctioning such a search where a juvenile defendant has done no more than summon a rescue squad to aid his grievously wounded brother?

III. Where the suppression court has found the ambiguous statement "you better do your job," made by a physically and emotionally distraught mother of a murdered 13 year old, did not constitute consent for a full blown search of her home, was not the Pennsylvania Superior Court's rejection of the lower court's factual finding arbitrary and capricious, depriving Petitioner of his right to Due Process under the Fifth and Fourteenth Amendments?

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1. When the Pennsylvania Superior Court reversed the suppression court's proper exclusion of evidence seized without a warrant under a crime scene exception, did it ignore this court's decision in *Flippo*, *infra*, expressly rejecting such an exception to the warrant requirements of the Fourth Amendment?

2. Did the Pennsylvania Superior Court err in finding an exception to the Fourth Amendment's proscription against warrantless searches and seizures, by sanctioning such a search where a juvenile defendant has done no more than summon a rescue squad to aid his grievously wounded brother?

3. Where the suppression court has found the ambiguous statement "you better do your job," made by a concededly physically and emotionally distraught mother of a murdered 13 year old, not to constitute consent for a full blown search of her home, was not the Pennsylvania Superior Court's rejection of the lower court's factual finding arbitrary and capricious, thus depriving Petitioner of his right to Due Process under the Fifth and Fourteenth Amendments?

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Appendix C - Opinion of John C. Uhler, President Judge, Court of Common Pleas of York County, Pennsylvania, entered May 7, 1999 . . . . . 6a

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The Petitioner, Zachary Witman, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

The Order of the Superior Court of Pennsylvania reversing, in part, the suppression order of the Court of Common Pleas of York County, Pennsylvania, is reproduced as Appendix "B." The Opinion of York County Common Pleas Court President Judge John C. Uhler is attached as Appendix "C."

JURISDICTION

Pennsylvania's Supreme Court denied Mr. Witman's Petition for Allowance of Appeal on December 20, 2000. By Order dated March 7, 2001, Justice Souter extended the time for filing to and including May 19, 2001. This Petition is filed within that time. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).[1]

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[1] Because the Pennsylvania Supreme Court declined to exercise discretionary review, and the last state court to rule on the merits of this case was the Superior Court of Pennsylvania, the writ is properly addressed

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides, in pertinent part, that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . ."

Amendment V to the United States Constitution provides, in pertinent part, that "No person shall. . .be deprived of. . . liberty. . . without due process of law. . ."

Amendment XIV to the United States Constitution provides, in pertinent part, that "No state shall. . . deprive any person of. . . liberty. . . without due process of law. . ."

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to the Superior Court of Pennsylvania. *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999).

STATEMENT OF THE CASE

This appeal arises from Pennsylvania's Superior Court's reversal, in part, of the order of the Court of Common Pleas of York County, which had ordered the suppression of various items of physical evidence. Those items were seized during a search of Petitioner's home. Petitioner, 15 years old at the time, is charged with the murder of his 13 year old brother.

A. Procedural History

Petitioner, Zachary Witman, 15 years old, was arrested on October 10, 1998 and charged with the October 2, 1998 murder of his 13 year old brother, Gregory. Petitioner moved to suppress evidence which had been seized during a warrantless search of his home on the evening of October 2, 1998.

Hearings were held on February 8 and March 31, 1999, before President Judge John C. Uhler in the Court of Common Pleas, York County. The parties extensively briefed the issues raised in the suppression motion and addressed at the hearings. Judge Uhler

granted Petitioner's Motion to Suppress, in part, suppressing 22 items of evidence. Judge Uhler's lengthy opinion and order is attached as Appendix "C."

The Commonwealth of Pennsylvania appealed Judge Uhler's order to the Superior Court of Pennsylvania certifying that the suppression order terminated or substantially handicapped its prosecution. On March 28, 2000, the Superior Court reversed Judge Uhler's order as to 16 of the 22 items ordered suppressed by Judge Uhler. The Superior Court, despite Judge Uhler's factual finding, found that the 15 year old Petitioner's call to 911 for help constituted implicit consent for a police search of his home. Additionally, the Superior Court, again in contrast to Judge Uhler's factual finding, found that Petitioner's mother's anguished demand of the police that they find her son's killer, telling a police officer that he "better do his job," constituted implied consent for a search of the residence.

Petitioner filed a timely Petition for Allowance of Appeal to the Supreme Court of

Pennsylvania. That Petition was denied on December 20, 2000.

B. Statement of Facts

On October 2, 1998, 13 year-old Gregory Witman was killed in his home at 9 Albright Court, New Freedom, Pennsylvania. Gregory's 15 year-old brother, Zachary, Petitioner herein, had been home from school, sick, and was asleep upstairs. Hearing sounds of a struggle, Zachary came downstairs and found his brother's body, covered in blood. He immediately called 911, at 3:17 p.m., for assistance. The 911 dispatcher sent fire, EMT personnel, and police to the Witman home.

Police Chief Childs, the second police officer to respond, and who arrived at 3:30 p.m., conducted a "protective sweep." He found no other victims, or perpetrators. During his sweep, Childs noticed blood on the inside of the front door, on the walls and floor of the foyer and hallway, drops of blood on the floor near the body, and blood at the location of the body. Shortly thereafter, police officers had the hysterical juvenile, Zachary, taken to a

nearby hospital for treatment for shock.

Meanwhile, Gregory and Zachary's mother, Amelia Sue Witman, who worked outside of Baltimore, Maryland, was contacted and advised of the tragedy. Ms. Witman, who was described by Chief Childs as very upset and emotional, arrived outside of her house sometime after 4:00 p.m. Childs explained to Ms. Witman ". . . what they were going to do as far as what we needed to do as far as processing the crime scene to obtain clues." Childs ". . . just assumed that you know, she knew what I wanted to do and what the detective team was going to do." He explained to her that personnel specialized in processing crime scenes had been called in and ". . . we just did it." Childs testified that Mrs. Witman demanded that the police find her son's killer, telling him, "You better do your job."

With the assistance of the Pennsylvania State Police Crime Scene Investigation Unit, police began a full scale search of the residence and its curtilage at approximately 5:30 p.m. The search and consequent seizures of a number of items, 22 of which Judge Uhler

ordered suppressed, continued until well past midnight.

The boys' father, Ronald Witman, arrived at York County Hospital, where Zachary was being treated, sometime between 7:00 and 8:00 p.m. One Detective Clancy advised Mr. Witman what was being done, and Mr. Witman responded, "Whatever it takes, do." Detective Clancy returned to the Witman residence sometime after 9:00 p.m. and advised the searching officers of Mr. Witman's above quoted remark.

The items ordered suppressed by Judge Uhler, the suppression court, were those items not in plain view during Chief Childs' security sweep, and which were seized prior to Ronald Witman's apparent consent to then search. The items ordered suppressed by Judge Uhler included, inter alia, various blood samples, items with blood on them, and latent fingerprint lifts.

C. Reasons for Granting the Writ

1. The Pennsylvania Superior Court ignored this court's rejection of a

crime scene exception to the Fourth Amendment's proscription against unlawful searches and seizures when, relying on just such a crime scene exception, it reversed the suppression court's proper exclusion of seized items.

The Pennsylvania Superior Court clearly refused to comply with this court's mandate in *Flippo v. West Virginia*, supra, and *Mincey v. Arizona*, 437 U.S. 385, 95 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Both cases held that there is no crime scene exception to the Fourth Amendment's bar to warrantless searches and seizures. Reversing the suppression court's finding that Mincey, supra, prohibits the transmogrification of a call for emergency aid into knowing and voluntary consent to a full blown search of one's domicile, Pennsylvania's Superior Court held that ". . . an exception to the warrant requirement must exist where defendant has summoned police and set the tone for the initial investigation" (Appendix "B" at 1.20).

In essence, and contrary to Mincey, supra, and Flippo, supra, the Pennsylvania

Superior Court has in this case held that the mere act of summoning help - - here, young Zachary's call was not for police, but rather for emergency medical help - - in effect constitutes per se consent.

This court, as noted by the suppression court judge, (Appendix "C" at 1.59), but ignored by Pennsylvania's Superior Court, has specifically held that a person's ". . . call for help can hardly be seen as an invitation to the general public that would have converted [one's] home into the sort of public place for which no warrant would be necessary." *Thompson v. Louisiana*, 469 U.S. 17, 22, 83 L.Ed.2d 246, 251-52, 105 S.Ct. 981, ___ (1984). As Judge Uhler noted in his opinion on suppression, " . . . a defendant does not lose his expectation of privacy under the Fourth Amendment by calling for emergency assistance." (Id.).

Judge Uhler succinctly summarized both the Commonwealth of Pennsylvania's fallacious argument, and the correct response thereto, as follows:

"The Commonwealth argues that the

> Defendant has relinquished his expectation of privacy by summoning the police to his residence to investigate a crime while deceiving the police into believing that another person committed the crime. This argument has not been accepted by the precedential case authority. In effect, the Commonwealth is asking the Court to ignore the time honored notion that a defendant is innocent until proven guilty. The reasoning of the Commonwealth would impermissibly convict the Defendant even before the evidence against him was gathered. See *Mincey v. Arizona*, 437 U.S. 385, 391, 57 L.Ed.2d 290, 299, 98 S.Ct. 2408, ___ (1978). Therefore, the Defendant has a reasonable expectation of privacy in his home which was not abandoned by his calling for emergency assistance." (Id. at 1.59-60).

Clearly, the Superior Court's conclusion that a call for medical assistance ". . . sets the tone. . . " for a full blown search of a crime scene, is contrary to this court's established case law in Mincey, supra, Flippo, supra, and Thompson, supra.

For that reason, this court should grant the petition for writ of certiorari, or in the alternative, reverse per curium the Superior Court's reversal of the lower court's suppression order.

2. The Pennsylvania Superior Court erred in finding an exception to the Fourth Amendment's proscription against warrantless searches and seizures, by sanctioning such a search where a juvenile defendant had done no more than summon a rescue squad to aid his grievously wounded brother.

The facts of the instant case are strikingly similar to the relevant facts in Thompson v. Louisiana, supra. In Thompson, the defendant shot her husband, and then took an overdose of pills. Having a change of heart, she called her daughter to tell her what she had done and to ask for help. The daughter called police, who transported Ms. Thompson to the hospital, and then commenced a warrantless search of her home.

This court held that the search was unconstitutional because Thompson's attempt to get medical assistance did not constitute consent to search her home. By calling for assistance, she did not evidence a diminished expectation of privacy.

Similarly, and without conceding, as in Thompson, that Zachary Witman is the perpetrator -- indeed his case has not yet even been tried -- Zachary's call to 911 for help can not be construed to be a sub silentio consent for the police to conduct an exhaustive search of his home. Thompson v. Louisiana, supra.

Petitioner, Zachary Witman does not dispute that police appropriately assisted rescue squad personnel in attempting to aid his brother, Gregory Witman. He also agrees that the protective sweep through the house was thoroughly appropriate. Those items seen during the protective sweep are properly admissible at trial, as Judge Uhler found in his suppression order. However, it is clear that 15 year old Zachary Witman's call for a rescue squad did not constitute consent for a open-ended police search throughout the

entire house and curtilage, Thompson v. Louisiana, supra.

This court should grant Zachary Witman's petition for writ of certiorari to clarify its ruling in Thompson v. Louisiana, supra, that a call for medical assistance, at a readily apparent crime scene, does not nevertheless constitute consent for a full blown search of one's residence. In the alternative, this Court should reverse, per curium, the order of the Superior Court of Pennsylvania, which reversed the lower court's order suppressing 16 items of evidence.

3. Where the suppression court found that the ambiguous statement "you better do your job," made by a physically and emotionally distraught mother of a murdered 13 year old did not constitute consent for a full blown search of her home, the Pennsylvania Superior Court's rejection of that finding was arbitrary and capricious, depriving Petitioner of his right to Due Process under the Fifth and

Fourteenth Amendments.

The Superior Court of Pennsylvania, despite its concession that Judge Uhler's findings of fact were well supported (Appendix "B" at 1.3), simply disregarded those well-supported factual findings.

Judge Uhler concluded that Mrs. Witman's statement "You better do your job" and her urging the police to find "Greg's killer," statements made by a emotionally and physically distraught mother, who had just learned of the death of her 13 year old child, did not constitute consent to search the Witman home.

As Judge Uhler correctly observed:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden can not be discharged by showing no more than acquiescence to a claim of lawful authority." *Commonwealth*

v. Bagley, 408 Pa. Super. 188, 596 A.2d 811 (Pa. Super. 1991). (Appendix "C" at 1.69).

Bagley, supra, relied on this court's holding in *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). In Bumper, supra, this court held that the prosecutor's burden of proving that consent was, in fact freely and voluntarily given, ". . . . can not be discharged by showing no more than acquiescence to a claim of lawful authority." (391 U.S. at 548-550, 88 S.Ct. at 1792, 20 L.Ed.2d at 802-803).

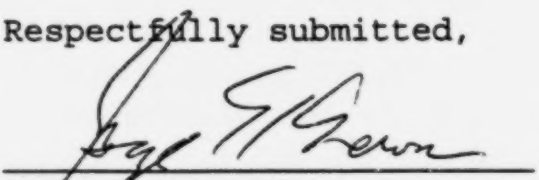
The Superior Court's arbitrary reversal of Judge Uhler's factual finding that the Commonwealth did not prove Ms. Witman consented at all, let alone freely and voluntarily, directly violates this court's mandate in Bumper, supra.

For that reason, this court should grant petitioner's petition for writ of certiorari, or in the alternative, reverse, per curium, the Superior Court's reversal of the lower court's order as to sixteen of the twenty-two items originally ordered suppressed.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, petitioner prays that this Honorable Court grant his petition for writ of certiorari to review the order of the Superior Court of Pennsylvania, or in the alternative, reverse per curium the Superior Court's order denying suppression, in part,

Respectfully submitted,



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